

1 Harry J. Pappas and Lise' M. Markham. Plaintiffs respectfully refer the Court to the
2 Declarations for a more detailed discussion of the facts.

3
4 A. THE IMPORTANCE OF TELEVISION TO COLLEGE FOOTBALL PROGRAMS

5 Numerous colleges and universities in the United States participate in
6 intercollegiate football. It is extremely important to institutions with prominent football
7 programs that their games appear on television:

8 1. Television appearances enhance the overall national prominence and reputation
9 of the university; they have the same effect on the athletic conference of which the
10 university is a member.

11 2. The American public is extremely interested in college football. Prominent
12 athletic programs stimulate the alumni enthusiasm and financial support--which benefit
13 the entire institution, not just the athletic department. Often, television is the only way
14 alumni can see their alma mater play football.

15 3. Television appearances are crucial to the recruitment of student athletes.

16 4. A prominent football program also aids in recruiting students who are not
17 involved in intercollegiate athletics--but who are attracted by the football program and
18 the school spirit which it engenders.

19 5. Television appearances can improve a college football team's rankings in the
20 national polls (FSU has been ranked among the top 25 college football teams in America
21 during the 1991 season and on various occasions in the past), and the team's chances of
22 being invited to a post-season bowl game, both of which increase alumni support and
23 effective recruiting.

24 6. Television appearances, and the resulting financial benefits, permit universities
25 to operate large athletic programs for both men and women. At major universities,
26 revenues from football is crucial in supporting the diverse athletic programs for men and
27 women students, including many programs which are not self-supporting and require
28 significant funding [Complaint, Paragraphs 11-13, inclusive, Pages 4-5].

1 B. THE NCAA'S ROLE IN TELEVISION COVERAGE OF INTERCOLLEGIATE
2 FOOTBALL

3 The By-Laws of the NCAA provide for the classification of members into three
4 divisions (denominated I, II, and III) according to specified criteria relating generally to
5 the size and diversity of each institution's athletic program. For the sport of football
6 only, those institutions recently have been further subdivided into Division I-A (consisting
7 of the institutions with major football programs) and I-AA. Generally speaking, Division
8 I-A members are those institutions with the most prominent and nationally-recognized
9 programs, and are most in demand for television appearances. All of the members of the
10 Defendant, the Big West, are members of Division I-A [Complaint, Paragraph 19, Page 8].

11 From 1951 until June 27, 1984, the NCAA formulated television plans for coverage
12 of college football by the commercial television networks. During this period, the NCAA
13 negotiated all agreements with the television networks, and controlled the entire market
14 for live college football television broadcasts. No NCAA member was permitted to sell
15 live television rights to its own college football games except in accordance with the
16 NCAA plan in effect [Complaint, Paragraph 20, Page 9].

17
18 C. THE NCAA DECISION

19 Two NCAA members brought a lawsuit against the NCAA alleging that the NCAA's
20 control of college football television violated the federal anti-trust laws. On June 27,
21 1984, the United States Supreme Court held in that lawsuit that the NCAA's television
22 plan (including its contracts with two national television networks pursuant to the plan)
23 violated Section 1 of the Sherman Act. The Supreme Court held that the NCAA plan had
24 the effect of fixing the prices for and restricting the output of live college football
25 television broadcasts, lacked any adequate justification for these anti-competitive
26 features, and therefore amounted to an unreasonable restraint of trade in violation of
27 Section 1 of the Sherman Act. NCAA v. Board of Regents of the University of Oklahoma,
28 et al., 468 U.S. 85, 104 S.Ct. 2498 (1984) (the "NCAA Decision") [Complaint, Paragraph

1 21, Page 9].

2 The Supreme Court concluded that the NCAA plan limited both the total amount
3 of televised college football available and the number of games that any one team could
4 televise. These limitations were found to be a classic horizontal agreement to limit
5 output (and thus enhance price) in restraint of trade. The Court referred to the District
6 Court's finding that the output restrictions had the effect of raising the price paid by the
7 networks for television rights, and pointed out that the restrictions could be enforced by
8 the NCAA's power to impose sanctions on its member institutions. The Court cited with
9 approval the District Court's conclusion that "many telecasts that would occur in a
10 competitive market are foreclosed by the NCAA's plan" and concluded that the output-
11 limiting aspect of the NCAA plan:

12 ". . . constitutes a restraint upon the operation of a free
13 market, and the findings of the District Court establish that it
14 has operated to raise price and reduce output. Under the rule
15 of reason, these hallmarks of anti-competitive behavior place
16 upon petitioner a heavy burden of establishing an affirmative
17 defense which competitively justifies this apparent deviation
18 from the operations of a free market."

19 The Supreme Court concluded that the justifications proffered by the NCAA were
20 insufficient to justify the anti-competitive effects of the restraints [Complaint, Paragraph
21 22, Page 10].

22
23 D. THE IMPORTANCE OF TELECASTING FRESNO STATE UNIVERSITY ATHLETIC
24 EVENTS TO KMPH

25 At both the corporate and station level of KMPH, a conscious decision has been
26 made to develop the franchise of KMPH by identifying KMPH as the community
27 television station serving the San Joaquin Valley. KMPH is referred to in promotional
28 activities as "We're your station". A critical building block in establishing KMPH as "your

1 station" has been KMPH's close identification with FSU. For over ten years KMPH has
2 telecast both home and away FSU athletic events to its viewers. For many years the
3 station subsidized the cost of telecasting FSU athletic events not only to help identify
4 KMPH as "your station," but also to provide a community service to its viewers in a
5 community where FSU looms large as a cultural and entertainment center of the San
6 Joaquin Valley. Approximately 5.5% of the gross revenues of KMPH for 1990 were
7 attributable to televising FSU football and basketball games. Recently KMPH has
8 celebrated 20 years of continuous operation and service to the San Joaquin Valley.
9 Prominently featured in the promotional spots aired over KMPH during the last few
10 weeks has been the relationship between KMPH and FSU, and specifically FSU athletics.
11 The association of KMPH with FSU and its nationally recognized athletic program is
12 important to KMPH as a critical building block in the creation of and maintenance of the
13 franchise value of the station, far beyond the numerical contributions to revenue and
14 profit made by FSU athletic telecasts. The association of KMPH with FSU is of equal
15 importance to the viewers of KMPH. For many of the viewers of KMPH, free television is
16 their sole source of affordable entertainment. KMPH, for many, is the only way to watch
17 the athletic exploits of the Fresno State Bulldogs [Abercrombie Declaration, Paragraphs
18 4-7, Pages 2-4]. The close identity of KMPH and FSU athletics has been instrumental in
19 developing viewer station loyalty and the continued close identity and relationship
20 between KMPH and FSU is critical to maintaining the identity of KMPH as "your
21 station" -- an attribute that makes KMPH unique among the commercial television
22 stations serving the Fresno market, of which there are a total of eight (8) [Pappas
23 Declaration, Paragraph 7, Page 5; Paragraph 21(h), Page 16.].

24 The signal of KMPH is received by 98% of the households within the ADI of
25 KMPH. FSU athletic events are among the most important entertainment events in the
26 San Joaquin Valley. For example, according to Arbitron the away game between
27 undefeated FSU and winless New Mexico State which was televised by KMPH on
28 Saturday afternoon, October 19, 1991 received a 33% share (nearly 200,000 persons

viewing in the entire Valley). Approximately one out of every three people watching television within the market area of KMPH, and during the rating period, was watching the Bulldogs on KMPH. Typically, ratings for afternoon games are lower than for evening games, and games against stronger opponents receive higher ratings. KMPH typically receives higher ratings on its FSU football telecasts than do its rival network affiliates which telecast, for example, the ABC "College Game of the Week" (Markham Declaration, Paragraph a5 and Exhibits "I" and "J"). Although Continental Cablevision, Inc. ("Continental"), the cable carrier for most of the market area of KMPH operates as a monopoly in the geographic area it is intended to serve, only 49% of the homes within the market area of KMPH subscribe to cable service [Pappas Declaration, Paragraph 7, Pages 4-5; Paragraph 12, Page 8]. On October 24, 1991, Defendant SportsChannel and Continental entered into a cable carriage agreement (please see Exhibit "K"). Nevertheless, only one out of two homes within the ADI of KMPH will be able to view events on SportsChannel, and only if they were willing to pay the installation charge of \$14.95 and the basic cable service fee of \$19.95 monthly and a monthly fee for the SportsChannel tier of service. For rural residents, of which there are many within the market area of KMPH, cable service is unavailable at any price [Pappas Declaration, Paragraph 6, Page 4; Paragraph 19, Page 12].

E. THE ROLE OF THE HOME TEAM IN TELEVISION COLLEGE FOOTBALL GAMES

At all times since the inception of television broadcasts of college football games, all television agreements for specific games were made by the home team. Defendant, the Big West, has specifically recognized this custom and practice in its by-laws which state, inter alia:

"It is the prerogative of the home team to allow the visiting team's television station to televise the game back to the visitor's home television market."

(Big West Conference 1991-92 Manual and Personnel Directory By-Laws, Part 4-Administrative Regulations, Section 403.5 Local Non-Network

1 Television Rights Fees Section 403.5.1.)

2 This provision was adopted and has been followed, among other reasons, because the
3 home team is in a better position than the visiting university to negotiate issues such as
4 stadium access, power supply and lighting, working media credentials, camera positions,
5 announcing booth space, complimentary tickets, and adherence to network and FCC
6 policies and regulations affecting the broadcast site [Complaint, Paragraph 17, Pages 7-
7 8].

8 UOP has agreed to allow FSU and KMPH to telecast the November 9, 1991 football
9 game between FSU and UOP scheduled to be played at the UOP home stadium. The
10 prerogative to telecast the FSU versus SJSU game would be FSU's but for the Defendants'
11 interference [Complaint, Paragraph 17, Pages 7-8; Abercrombie Declaration, Paragraph 9,
12 Pages 4-5].

13
14 F. TELEVISION BROADCASTING AGREEMENT BETWEEN KMPH AND FSU

15 Subsequent to the NCAA Decision in 1984, the California State University, Fresno
16 Athletic Corporation ("Corporation"), California Sports Network ("CFSN") and Plaintiffs
17 entered into a Television Broadcasting Agreement dated July 1, 1985. In that contract
18 CFSN and Plaintiffs are sometimes referred to collectively as "Contractors" and that
19 contract provides, inter alia:

20 RIGHTS

21 A. TELEVISION BROADCASTING RIGHTS

22 Subject to the covenants, terms, and conditions herein set forth,
23 Corporation grants Contractors the first right of refusal for television
24 broadcasts rights of all NCAA sports events sponsored by Corporation.
25 [Emphasis added.]

26 (1) AREAS OF EXCLUSIVITY

27 Said rights shall cover Contractor's (and/or Network) area of
28 dominant influence ("ADI") which is defined as the counties of

Fresno, Kern, Kings, Madera, Tulare, Mariposa, Merced, Stanislaus,
San Benito, San Luis Obispo, and San Joaquin.

B. BROADCAST EVENTS

(2) [And] a minimum of four (4) live football away games and
negotiated advanced, sell out home games annually.

D. TERM OF AGREEMENT

This agreement shall be for a term commencing on July 15, 1985 and
ending June 30, 1988; provided, however that Contractors shall have a
two-year option to renegotiate this agreement for the 1988-89 and 1989-90
years. On or before April 15, 1988, Corporation shall provide Contractors
with the terms and conditions of the extended agreement. Contractors
shall exercise said option on or before May 1, 1988 and the written
agreement shall be made and entered into not later than June 1, 1988.

H. FEEDS, TELECAST SALES

(1) Contractors and Corporation may sell said telecasts outside the
Contractor's ADI. Contractors and Corporation shall share any rights
fees negotiated at a split of 50% each. Said compensation does not
include any production charges for said telecasts which shall be
exclusive property of Contractors. Any outside interest seeking to
televise games scheduled for airing by Contractors must negotiate
with the Contractors for using said telecast content. (All production
costs paid by other parties remain 100% the property of
Contractors.) [Original emphasis]

I. ADDITIONAL PRODUCTION

(6) Contractors retain first right of refusal for all Corporation
athletic events. Any sport or particular event not retained for
broadcast by Contractors shall become available to other stations
and/or cable outlets. [Emphasis added.]

1 The contract was executed by Howard Zuckerman on behalf of CFSN and by Harry
2 Pappas on behalf of Plaintiffs. Gaylord O. Graham executed the contract on behalf of
3 California State University, Fresno Athletic Corporation as Chairman of the Board of that
4 entity.

5 An Addendum to said contract was also executed by the parties on July 1, 1985.
6 That Addendum provides, inter alia,

7 *EXCLUSIVITY: The parties hereto agree that no other television medium shall be
8 licensed to carry or broadcast the events carried by station - Contractor pursuant
9 to the rights granted by this Agreement when such medium would carry or telecast
10 such events into or within the "Area of Exclusivity" described in Paragraph A.1 of
11 the Agreement.

12 This provision, which by asterisk is inserted into Paragraph 13 of the Addendum, was
13 initialled by Messrs. Graham, Pappas and Zuckerman. True and correct copies of the
14 Television Broadcasting Agreement and the Addendum are attached hereto as Exhibit "A"
15 and incorporated herein by reference.

16 Pursuant to Exhibit "A", specifically Paragraph A-3, on Page 2, the only limitations
17 or exceptions respecting Plaintiffs' right of first refusal to televise all FSU athletic events
18 are: Plaintiffs' rights would be subject to the rights of the home school if the intended
19 television broadcast were an FSU away contest; and excepted from the rights granted to
20 Plaintiffs were nationwide telecasts of FSU athletic events which might be carried over
21 any, or all, of the three, free, over the air television networks: ABC, NBC and CBS; and
22 one "game of the week" to be telecast over the KATZ Network ("KATZ") or subsequently
23 its successor, Raycom, which had a contract with the Pacific Coast Athletic Association
24 ("PCAA"), the predecessor to the Big West. KATZ or its successor, Raycom, had the right
25 to telecast one game per week over free, over the air, television. The word "telecast"
26 used in Paragraph A-3 was used by the parties to distinguish between free, over the air
27 broadcasts, such as that transmitted by Plaintiffs' television station, KMPH, and cable
28 carriage of television pictures which are not transmitted by a television signal. At the

1 time Exhibit "A" was negotiated, except for the Entertainment Sports Programming
2 Network ("ESPN"), which was in its infancy, there was no cable sports carriage. Further,
3 ESPN had not expressed any interest in cable carriage of PCAA or FSU games and there
4 were no agreements between the PCAA and ESPN or any other cable organizations.
5 Pursuant to Exhibit "A", Paragraph I-6, it was only after Contractors (Plaintiffs) refused to
6 televise an FSU athletic event, that Corporation (FSU) could offer the event to "other
7 stations/and/or cable outlets" [emphasis added]. [Exhibit "A"; Zuckerman Declaration,
8 Paragraphs 5-7, Pages 1-2; Johnson Declaration, Paragraph 4, Pages 1-2.]

9 Because of the significant contributions made by Plaintiffs to the growth and
10 success of the FSU athletic program, FSU agreed in 1987 that Plaintiffs would have the
11 right to further extend the original term of the contract (through June 30, 1990), an
12 additional year through the 1990-1991 season (which ended June 30, 1991). Further,
13 on or about March 5, 1991, before the expiration of the agreement between FSU and
14 Plaintiffs, the contract was further extended through and including the 1991-1992 season
15 (terminating on June 30, 1992). Attached hereto as Exhibit "B" is a true and correct
16 copy of the extension and continuation of the FSU/KMPH Television Broadcast
17 Agreement, incorporated herein by reference. That extension was drafted by Scott
18 Johnson ("Johnson"), Assistant Athletic Director and Director of Sports Information for
19 FSU and was executed by Les Snyder, Jr., General Manager, California State University,
20 Fresno Athletic Corporation on March 5, 1991 and by LeBon Abercrombie on behalf of
21 KMPH on March 1, 1991 [Johnson Declaration, Paragraphs 5-6, Pages 1-2].

22 Sometime prior to January 31, 1989, three and a half years after the execution of
23 the contract between KMPH and FSU [Exhibit "A"], Defendant, the Big West, negotiated a
24 contract with Defendant Marketing. Marketing was to be the agent for Defendant, the
25 Big West, and would sell a package of athletic events to regional and national television
26 networks and/or cable networks for cable carriage. On or about January 31, 1989,
27 Defendants, the Big West and Marketing, entered into a contract which purports to grant
28 to Marketing the right of first refusal with respect to all conference athletic events,

1 including those of FSU, both within and outside the ADI of KMPH. Johnson informed
2 the athletic director of FSU, Gary Cunningham ("Cunningham") that Defendant, the Big
3 West, was attempting to sell rights to Marketing which FSU had already sold to KMPH
4 three and a half years earlier [Johnson Declaration, Paragraph 7, Pages 2-3].

5 Notwithstanding the apparent discrepancy between the earlier rights granted to
6 Plaintiffs and those purportedly and subsequently granted to Marketing, as a result of the
7 close cooperation between FSU and KMPH, KMPH was able to broadcast a full and
8 complete schedule of football and basketball events during the 1989-1990 season and a
9 full football schedule during the 1990-91 season. Further, when a problem arose with
10 respect to who had the primary rights to broadcast athletic events in which FSU was a
11 participant, KMPH and the party with whom Marketing apparently reached an
12 arrangement with respect to broadcasting conference sporting events, Defendant
13 SportsChannel, was able to cooperatively produce the events utilizing a "split-feed,"
14 whereby KMPH telecast the event exclusively within its ADI and SportsChannel provided
15 the event via cable carriage outside the ADI of KMPH. This was true until March, 1991
16 when Defendant SportsChannel refused KMPH a "split-feed" for an away basketball game
17 between New Mexico State University and FSU which SportsChannel was unable to
18 broadcast into most of the ADI of KMPH because it had no carriage contract with
19 Continental [Johnson Declaration, Paragraph 8, Page 3].

20 Early in 1990, Defendants, the Big West and Marketing, discussed the
21 renegotiation of their contract. The athletic directors representing the individual
22 conference members met in Santa Barbara, California, in or about April of 1990. The
23 express purpose of this meeting was to let a new contract, after open bidding, for
24 television cable coverage of conference athletic events. Prior to the commencement of
25 that meeting Johnson advised Cunningham that KMPH had preexisting contractual rights
26 to broadcast FSU athletic events and that any contract between Defendants, the Big West
27 and Marketing, or any other party, to the contrary would be inconsistent with his
28 understanding that FSU had previously sold these rights to KMPH. [Johnson Declaration,

1 Paragraph 9, Pages 3-4] There was no open bidding and the contract with Defendant
2 Marketing was renegotiated and executed with terms and conditions which were not in
3 the best interest of the individual members of the Big West.

4 After the conclusion of the meeting in Santa Barbara, in or about April 1990,
5 Cunningham advised Johnson that he had abstained, on behalf of FSU, from the vote
6 which approved the new contract between Defendants, Marketing and the Big West.
7 Further, Defendants Marketing, the Big West and SportsChannel were all advised of
8 FSU's contract with KMPH during the meeting in Santa Barbara in or about April 1990
9 [Johnson Declaration, Paragraph 10, Page 4].
10

11 G. 1991 KMPH/FSU TELEVISION FOOTBALL SCHEDULE

12 Pursuant to and in fulfillment of its contractual obligations with FSU, KMPH was
13 originally scheduled to broadcast the following six (6) home and away games on the
14 following dates:

15 Northern Illinois - September 7, 1991 (Home)
16 Washington State - September 14, 1991 (Away)
17 Oregon State - September 21, 1991 (Away)
18 New Mexico - October 5, 1991 (Home)
19 New Mexico State - October 19, 1991 (Away)
20 Utah State - November 2, 1991 (Away)

21 [Johnson Declaration, Paragraph 12, Page 4.]

22 As a result of contractual provisions between Prime Ticket, and the Pac-10
23 Conference, which provisions of exclusivity were asserted by Prime Ticket, Plaintiff KMPH
24 was unable to telecast the originally scheduled away games between FSU and Pac-10
25 members, Washington State University, and Oregon State University.

26 To date Channel 26 has broadcast only the Northern Illinois, New Mexico and New
27 Mexico State games. KMPH will broadcast the Utah State game on November 2, 1991.
28 These four (4) telecasts will total two home and two away games with only three games

1 remaining to be played after the November 2, 1991 telecast of the Utah State game
2 [Johnson Declaration, Paragraph 13, Page 5].

3 Because of Prime Ticket's interference with the right of KMPH to broadcast the
4 FSU v. Washington State and FSU v. Oregon State games, FSU has offered two (2)
5 alternative two (2) game packages to KMPH so that KMPH and FSU can fulfill their
6 mutual contractual obligation to broadcast six (6) FSU football games and "... a
7 minimum of four (4) live football away games and negotiated advanced sell out games
8 annually." [Exhibit "A", Paragraph B.2, Page 2; Johnson Declaration, Paragraph 11, Page
9 4].

10 The two alternative packages which FSU previously offered to KMPH consisted of
11 the following:

12 Package 1: The away game between FSU and UOP on November 9, 1991 and FSU
13 v. San Jose State on November 23, 1991 which is a home game. This package is
14 preferred by FSU because the game against Pacific is a traditional rivalry and is an
15 away game and, therefore, the FSU home gate receipts will not be negatively
16 impacted. Further, because the San Jose State game is traditionally the biggest
17 interconference game, frequently decides the conference championship, is usually a
18 sell out and, is likely to be a sell out, the chance that the FSU home gate receipts
19 will be damaged by televising this game is diminished.

20
21 Package 2: The home games between FSU and Long Beach State and Cal State
22 Fullerton on October 12, 1991 and November 16, 1991, respectively. KMPH was
23 advised by FSU that FSU preferred that these games not be broadcast because the
24 broadcast of these games would hurt the FSU home gate receipts because Long
25 Beach and Fullerton are not particularly strong teams this year and are not
26 traditional rivals of FSU.

27 In the judgment of KMPH, this package was of less interest to KMPH viewers and,
28 therefore, of lesser value to the KMPH advertisers who had purchased advertising based

1 upon the original schedule, including the two games against the two (2) Pac-10
2 opponents [Johnson Declaration, Paragraphs 14-15, Pages 5-6]. Pursuant to the
3 agreements between KMPH and the advertisers, KMPH has guaranteed certain ratings
4 during each of the football telecasts. In the judgment of KMPH, those ratings will be
5 achievable by substituting the UOP and San Jose State games for the originally scheduled
6 games against the two (2) Pac-10 opponents [Markham Declaration, Paragraphs 5-10,
7 Pages 2-4].

8 If KMPH is able to broadcast the UOP and San Jose State games, then the
9 combination of those two (2) games, together with the previously broadcast Northern
10 Illinois, New Mexico, New Mexico State and Utah State games, will total six (6) FSU
11 football games, as contractually stipulated in Exhibit "A," and further KMPH will have
12 satisfied the provisions of Paragraph B-2 of Exhibit "A" which obligates KMPH to
13 broadcast a total of four (4) away and sold out home games annually. New Mexico
14 State, Utah and UOP would be the away games and San Jose State would be the sold out
15 home game. A package of telecasts, including the UOP and San Jose State games, is the
16 only package which will allow the parties to Exhibit "A," FSU and KMPH, to fulfill their
17 mutual contractual obligations [Johnson Declaration, Paragraph 16, Page 6].

18 Prior to October 3, 1991, Plaintiffs were advised by FSU that Defendant
19 SportsChannel asserted a primary and exclusive right to carry the FSU and UOP games as
20 a result of an arrangement they had with Defendants Marketing and the Big West
21 [Pappas Declaration, Paragraph 11, Page 7; Paragraph 14, Page 9].

22 Because KMPH had, on previous occasions, cooperatively produced FSU football
23 and basketball broadcasts via a "split-feed" with Defendant SportsChannel, and because
24 Cunningham had previously advised, and reaffirmed in a conversation on October 10,
25 1991, that FSU is afraid of reprisals from the Defendants, and because negotiating a
26 resolution would be far more efficient and less costly than litigation, Plaintiff Harry J.
27 Pappas telephoned representatives for Defendant SportsChannel.

28 On October 3, 1991, Plaintiff Harry J. Pappas, spoke by telephone with John

1 Moore, President of Defendant SportsChannel. After exchanging pleasantries and a
2 discussion of their respective positions, Mr. Moore said "We buy these rights to drive
3 distribution". His meaning was clear: SportsChannel would not agree to a split-feed for
4 these games because the exclusive right to have these games seen within the ADI of
5 KMPH via the SportsChannel network would be a powerful inducement for Continental
6 to finally agree to a carriage contract between Continental and SportsChannel.

7 Plaintiff, Harry J. Pappas, on behalf of KMPH, advised Mr. Moore that if Defendant
8 SportsChannel would not agree to a split-feed by close of business on October 4, 1991,
9 KMPH would have to pursue other alternatives [Pappas Declaration, Paragraphs 13-15,
10 Pages 9-10].

11 On October 7, 1991, Harry J. Pappas, on behalf of KMPH, spoke with the area Vice
12 President of Continental, Michael Morris, who told Mr. Pappas that, "We at Continental
13 Cablevision do not think we should have to buy from SportsChannel this premium cable
14 service at a price we believe is too high to pass on to our subscribers just because
15 SportsChannel paid astronomic prices for cable rights to these games." Mr. Pappas, on
16 behalf of KMPH, also thanked Mr. Morris for his letter of October 2, 1991, in which Mr.
17 Morris, unaware that KMPH had preexisting rights to the UOP and San Jose State games,
18 nevertheless urged Defendant SportsChannel to agree to a split-feed for the UOP and San
19 Jose State games and assured Defendant SportsChannel that such action would facilitate
20 their negotiations [Pappas Declaration, Paragraph 16, Pages 10-11].

21 Nevertheless Defendants SportsChannel, the Big West, and Marketing have refused
22 and continue to refuse to allow KMPH to telecast the FSU v. UOP game and the FSU v.
23 San Jose State game.

24 Based upon the Arbitron ratings for the October 19, 1991 game against New
25 Mexico State, one of the lower rated FSU/KMPH football telecasts, approximately 66,000
26 households watched the October 19, 1991 game. Approximately 50% of these
27 households have cable, the remaining 50%, or approximately 33,000 which viewed that
28 FSU game do not have cable. Therefore, if just these approximately 33,000 households

1 (out of 230,000 homes within the ADI of KMPH which not have cable) all signed up
2 with Continental, a minimum of \$1,155,000 in revenues would be immediately generated
3 for Continental and Defendant SportsChannel. Subsequently, additional monthly
4 revenues would be a minimum of \$660,000. The current cost to the consumer of
5 viewing FSU football and basketball games on KMPH is \$0 [Pappas Declaration,
6 Paragraph 20, Pages 12-13].

7 The minimum time necessary to get the UOP game and the San Jose State game in
8 the T.V. Guide is approximately 10 to 14 days and KMPH needs a minimum of
9 approximately 12 to 14 days to promote each game [Pappas Declaration, Paragraph 22,
10 Page 17].

11 III

12 ARGUMENT

13 A. THE PROCEDURAL REQUIREMENTS FOR ISSUANCE OF A TEMPORARY 14 RESTRAINING ORDER

15 The procedural prerequisites for the issuance of a Temporary Restraining Order
16 ("TRO") by this Court, are set forth in the Federal Rules of Civil Procedure (F.R.C.P. Rule
17 65) and this Court's local rules (Local Rule 231). A TRO may be granted without written
18 or oral notice to the adverse party only upon a clear showing of immediate irreparable
19 injury (F.R.C.P. Rule 65b(1)); the applicant counsel must certify to the Court in writing
20 what efforts, if any, have been made to give notice to the adverse party notice (F.R.C.P.
21 Rule 65(b)(2)); the successful applicant must post security on such terms as the Court
22 deems proper (F.R.C.P. Rule 65(c)), and; the order granting a TRO shall set forth the
23 reasons for its issuance and should be specific in terms and describe, in reasonable detail,
24 the act or acts sought to be restrained (F.R.C.P. Rule 65(d)).

25 This Court's local rules specifically set forth the procedural requirements for the
26 issuance of a TRO. Local Rule 231 is summarized below in order to demonstrate the
27 Plaintiffs'/Applicants' conformance with the applicable local rule.
28

1 **Rule 231 - Temporary Restraining Order - Preliminary Injunction**

2 (a) **Temporary Restraining Orders.** Except in the most extraordinary of
3 circumstances, no temporary restraining order shall be granted in the absence of actual
4 notice to the affected party and/or counsel, by telephone or other means, or a sufficient
5 showing of efforts made to provide notice. . . . [Notice was given by telephone on
6 October 28, 1991, please see Declaration of Gary E. Cripe.]

7 (b) **Timing of Application.** In considering an application for a temporary
8 restraining order, the Court will consider whether the applicant could have sought relief
9 by motion for preliminary injunction at an earlier date without the necessity for seeking
10 last-minute relief by application for temporary restraining order. . . . [Please see Cripe
11 Declaration and Pappas Declaration, Paragraphs 3-8 and 17, respectively, which explain
12 the timing of the Application.]

13 (c) **Documents to be Filed.** No hearing on a temporary restraining order will
14 normally be set unless the following documents are provided to the Court and, unless
15 impossible under the circumstances, to the affected parties of their counsel:

16 (1) a Complaint [Filed on October 24, 1991, and copies sent to the
17 Defendants by Federal Express on October 24, 1991].

18 (2) a motion for temporary restraining order, [this document personally
19 served, or served by facsimile. Please see Cripe Declaration and Davis Declaration].

20 (3) a brief on all relevant legal issues presented by the motion,
21 [personally served or served by facsimile. Please see Cripe Declaration and Davis
22 Declaration].

23 (4) an affidavit in support of the existence of an irreparable injury
24 [Please see Pappas Declaration, Paragraphs 21-22].

25 (5) an affidavit detailing the notice or efforts to effect notice to the
26 affected parties or counsel or showing good cause why notice should not be given,
27 [Please see Cripe Declaration, Paragraphs 3 - 11.]

28 (6) a proposed temporary restraining order with a provision for a bond,

1 see L.R. 151, [Please see "Proposed Order" filed concurrently herewith].

2 (7) a proposed order with blanks for fixing the time and date for hearing
3 a motion for preliminary injunction, the date for the filing of responsive papers, the
4 amount of the bond, if any, and the date and hour of issuance and [Please see "Proposed
5 Order" filed concurrently herewith]

6 (8) in all instances in which a temporary restraining order is requested
7 ex parte, the proposed order shall further notify the affected party that he may apply to
8 the Court for modification or dissolution on two (2) court days notice by personal service
9 or such other notice as the Court may allow. See F.R.C.P. Rule 65(b); Local Rule 136.
10 [Please see "Proposed Order" filed concurrently herewith].

11
12 B. THE SUBSTANTIVE REQUIREMENTS FOR ISSUANCE OF A TEMPORARY
13 RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

14 The substantive requirements for the issuance of a TRO and a preliminary
15 injunction are identical; F.R.C.P. Rule 65. In Los Angeles Memorial Coliseum Comm'n v.
16 National Football League, 634 F.2d 1197 (9th Cir. 1980) ("L.A. Memorial Coliseum"), the
17 court set forth the tests for granting a preliminary injunction in this Circuit. The
18 traditional standards are described as:

- 19 (1) a strong likelihood of success on the merits;
20 (2) the possibility of irreparable injury to Plaintiff if the preliminary relief is not
21 granted;
22 (3) a balance of hardships favoring the Plaintiff; and
23 (4) advancement of the public interest.

24 Id. at 1200. The court then stated that the moving party may also meet its burden by
25 demonstrating "(1) a combination of probable success on the merits and the possibility of
26 irreparable injury, or (2) that serious questions are raised and the balance of hardships
27 tips sharply in its favor." Id. at 1201. As the L.A. Memorial Coliseum court noted,
28 however, "these are not separate tests, but the outer reaches of 'of a single continuum.'"

1 Id. (quoting Benda v. Grand Lodge of International Ass. of Machinists, 584 F.2d 308,
2 315 (9th Cir. 1978), cert. dismiss'd, 441 U.S. 937 (1979)). See, State of California v.
3 American Stores Co., 872 F.2d 837 (9th Cir. 1989) and Big Country Foods, Inc. v. Board
4 of Education Anchorage School District, 868 F.2d 1085 (9th Cir. 1988), also in accord.

5 The test for injunctive relief based upon a violation of the antitrust laws is the
6 same under Section 16 of the Clayton Act, 15 U.S.C. Section 26. See L.A. Memorial
7 Coliseum, 634 F.2d at 1200. Plaintiffs are entitled to a TRO and a preliminary injunction
8 under either formulation of the standard.

9
10 C. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

11 1. Defendants' Restraint Violates Section 1 Of the Sherman Act

12 In view of the Supreme Court's disposition of similar antitrust claims in the NCAA
13 Decision, and the Ninth Circuit's disposition of similar antitrust claims in The ABC
14 Decision, and because there are no legitimate or even plausible pro-competitive
15 justifications for the horizontal and vertical agreement among competitors to limit output
16 presented in this case, Plaintiffs are almost certain to prevail on the merits of their
17 antitrust claim against Defendants.

18 a. The NCAA Decision.

19 In the NCAA Decision, the Supreme Court held:
20 . . . The NCAA member institutions have created a horizontal
21 restraint -- an agreement among competitors on the way in
22 which they will compete with one another . . . [T]he
23 horizontal agreement places an artificial limit on the quantity
24 of televised football that is available to broadcasters and
25 consumers. By restraining the quantity of television rights
26 available for sale, the challenged practices create a limitation
27 on output . . ." NCAA Decision, 468 U.S. 99 (footnote
28 omitted).

1 The Court further observed that such horizontal restraints ordinarily are unlawful per se,
2 but that such treatment was inappropriate in the case of the NCAA because the NCAA
3 necessarily restrained the manner in which its members compete, "enabling college
4 football to preserve its character" and allowing "a product to be marketed which might
5 otherwise be unavailable." Id.⁴ The Big West in no way preserves the character of
6 college football--that role is still reserved for the NCAA. Further, the preexisting contract
7 between KMPH and FSU belies the notion that but for the Big West, football would not
8 be televised. It is precisely because of the Big West and the other Defendants that
9 200,000 to 250,000 Bulldog fans may not see these games.

10 Even under the rule of reason, however, the Court concluded that "[t]he anti-
11 competitive consequences of [the NCAA's] arrangement are apparent. Individual
12 competitors lose their freedom to compete. Price is higher and output lower than they
13 would otherwise be, and both are unresponsive to consumer preferences." Id. at 106-107
14 (footnotes omitted) [Emphasis added]. "Under the rule of reason, these hallmarks of
15 anti-competitive behavior place upon [the NCAA] a heavy burden of establishing an
16 affirmative defense which competitively justifies this apparent deviation from the
17 operations of a free market." Id. at 113. The ABC Decision, in analyzing the NCAA
18 Decision, concurred with the reasoning of the Supreme Court, but disagreed that the
19 analysis lead to the application of the rule of reason in the ABC case. Rather, the Ninth
20 Circuit said that the Supreme Court's analysis in the NCAA Decision begged for the
21 application of the illegal per se rule. 757 F.2d 516.

22 b. The Big West's Restrictive Plan.

23
24 ⁴In concluding that the NCAA's restrictions should be analyzed under the rule of
25 reason, the Supreme Court adverted to cases holding that "a joint selling arrangement
26 may be so efficient that it will increase sellers' aggregate output and thus be pro-
27 competitive," Broadcast Music, Inc. v. CBS, 441 U.S. 1, 18-23, 99 S. Ct. 1551 (1979),
28 and that "a restraint in a limited aspect of a market may actually enhance marketwide
competition," Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57, 97 S.Ct.
2549, 2558-61 (1977), and to "[r]espondents' [concession] that the great majority of the
NCAA's regulations enhance competition among member institutions." 468 U.S. 99.

1 This case presents precisely the same sort of horizontal agreement to limit
2 output as presented in both the NCAA Decision and the ABC Decision. The Big West
3 member institutions, competitors at the same level of the market structure, have
4 combined to form a horizontal cartel, have agreed among themselves to limit the cartel's
5 output of local, regional and national network television and cable coverage of college
6 football games. In addition, the Big West has ceded to a joint marketing agent,
7 Defendant Marketing, the exclusive right to sell television coverage of their football
8 games, whether home or away. Marketing apparently has sold the cable rights to
9 Defendant SportsChannel. Not only, therefore, is the Big West a horizontal cartel, it has
10 joined with Defendants Marketing and SportsChannel to create a vertical monopoly.

11 This arrangement is a classic cartel. The Big West, as exclusive and joint
12 representative of all of its members, has entered into agreements with Marketing and
13 Marketing, in turn, with SportsChannel. Defendants maintain that even though
14 SportsChannel is unable to serve at least 50% of the ADI of KMPH, the cartel's rights are
15 exclusive. This combination in restraint of trade is enforceable by powerful sanctions:
16 Big West members who cheat on the cartel may forfeit their participation fees, face
17 exclusion from any future television agreements, or suffer other penalties because
18 punishment for such crimes is in the discretion of the Conference Compliance
19 Committee.⁵ Indeed, FSU undoubtedly fears that if it appears on KMPH against UOP
20 and SJSU in compliance with its contractual obligations to KMPH which originated in
21 1985, that the Big West may elect to investigate and punish FSU pursuant to its By-Laws.
22 Further, FSU is fearful that potential sanctions could be more subtly employed: for
23 example, the Big West or individual members could refuse to schedule FSU with Big
24 West opponents after the 1991 season when FSU becomes a member of the Western

25
26 ⁵"The Compliance Committee of the Big West is authorized to adjudicate cases of
27 alleged violations of the Conference or NCAA rules, . . ." and may assess whatever penalty
28 is appropriate. 1991-1992 By-Laws of the Big West Conference, Sections 108.2 and
108.3, true and accurate copies of which are attached as Exhibit "O," and incorporated
herein by reference.

1 Athletic Conference ("WAC"); or, SportsChannel, a major national cable network, could
2 boycott FSU games.

3 The Defendants' action is particularly egregious here because the cartel does not
4 have the ability to carry the game to 50% of the television market served by KMPH.
5 Moreover, the considerations which led the Supreme Court to analyze the NCAA
6 restraints under the rule of reason are conspicuously lacking here. The Supreme Court
7 said that in a market where the product is competition itself, as in the case of college
8 football, some restraints are essential to create and differentiate the product. NCAA
9 Decision, 468 U.S. 99. Such an approach is necessary and proper in considering the
10 practices of the NCAA, the governing body of intercollegiate sports. But Defendants here
11 can rely on no such justification -- while their restraints have the same obvious anti-
12 competitive, output-limiting, price enhancing effects as those condemned in the NCAA
13 Decision, the Big West performs no concomitant function related to product
14 differentiation or regulation. The NCAA continues to perform those important functions
15 on behalf of intercollegiate amateur football.

16 The Big West is no more and no less than a horizontal combination of competitors
17 who, in deciding how their product will be marketed, have become vertically integrated
18 by selecting a joint marketing agent, Defendant Marketing, and an exclusive vendor,
19 Defendant SportsChannel, to enforce the jointly agreed-upon limitations on output. To
20 enhance the value of their cartel, the Big West individual members are being induced,
21 begrudgingly in the case of FSU, to boycott the cartel's (stations like KMPH) competitors.
22 The threat of sanctions exists for errant cartel members. See, e.g., Associated Press v.
23 United States, 326 U.S. 1, 65 S.Ct. 1416 (1945); Fashion Originators Guild v. FTC, 312
24 U.S. 457, 61 S.Ct. 703 (1941).

25 There exists no plausible argument that the exclusivity provision of the Big West,
26 Marketing, SportsChannel agreements are pro-competitive. The restraint is employed
27 with the sole purpose and effect of limiting competition and thus raising price, excluding
28 non-participants, and restricting options that would otherwise be available to the viewing

1 public. What is pro-competitive about preventing television coverage into television
2 markets the cartel cannot serve?

3 The Defendants agreements have at least two other anti-competitive effects. First,
4 by restricting output and, thereby, increasing the price they eliminate potential
5 competition among Big West member universities and conferences, to the extent that
6 such members would otherwise vie for local television contracts in competition with one
7 another. See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 149-53, 68
8 S.Ct. 915, 925-26 (1948). Second, an unlawful vertical effect of the restraint is the
9 disadvantage foisted upon KMPH and consumers by the cartel: (1) an individual local
10 station competing with SportsChannel is prevented from covering games of local interest
11 which SportsChannel cannot air for the benefit of KMPH viewers; and (2) if cable
12 carriage is available, at all, it comes at a significant cost whereas before the same product
13 was available for free on KMPH.

14 Although SportsChannel cannot carry the subject games to 50% of KMPH's
15 viewers, it will nevertheless make sure that no one else can televise the game for those
16 viewers. Fortunately for Plaintiffs and the football-viewing public, the NCAA Decision
17 and its progeny, including the ABC Decision, and the Sherman Act do not tolerate that
18 attitude where its consequence is a limitation of output inimical to consumer welfare.

19 Even if this Court were to conclude that the restrictions imposed by Defendants
20 should be analyzed under the rule of reason rather than struck down as unlawful per se,
21 the conclusion still must be the same. Under the rule of reason, the question is whether
22 a restraint on intrabrand competition is a reasonable (pro-competitive) means of
23 increasing interbrand competition. See, GTE Sylvania, 433 U.S. at 54, 97 S.Ct. at 2560.
24 The Supreme Court recognized the possibility that, if competitive conditions were
25 restored in the market for live college football, "certain forms of collective action might
26 be appropriate in order to enhance [the] ability to compete." NCAA Decision, Id. at 115.
27 But as the Court also stated, "the essential inquiry remains the same -- whether or not
28 the challenged restraint enhances competition." Id. at 104 (footnote omitted).

1 No substantial issue is presented under the rule of reason. First, the Big West,
2 Marketing, SportsChannel restriction does not limit only competition among Big West
3 members (intrabrand competition), but also purports to preclude local television
4 coverage of crossover games (interbrand competition). Second, even if viewed
5 (incorrectly) as a "mere" limitation on intrabrand competition, the Defendants' restriction
6 inarguably has the effect of limiting both competition and the range of choices available
7 to consumers, without any offsetting pro-competitive benefits whatsoever. Its only effects
8 are to prevent viewers from seeing the games, or force consumers to pay for something
9 historically they have received for free on KMPH. It may safely be assumed that the Big
10 West and its member institutions on the one hand, and Marketing and SportsChannel on
11 the other, reap benefits in the form of increased revenues from the restraint of their
12 agreements. That increased revenue, however, is a monopoly profit extracted from
13 consumers, not a pro-competitive benefit entitled to any weight in the antitrust calculus.

14 Plaintiffs respectfully submit that they are virtually certain to prevail on the merits
15 of their antitrust claims.

16 2. Defendant, The Big West, Co-Defendants, Marketing
17 and SportsChannel, Are Inducing FSU,
18 A Member Of The Defendant, Big West, To
19 Breach Its Contract With KMPH

20 As is set forth in detail in the factual statement, with specific reference to the
21 Declarations of Messrs. Zuckerman, Johnson, Abercrombie and Pappas, KMPH has for
22 over 10 years been broadcasting FSU athletic events. Since July 1, 1985, through and
23 including the present time, KMPH has owned exclusive, uninterrupted rights to televise
24 FSU athletic events, subject only to the rights of the home team and excepting only a
25 single game of the week to be broadcast on either the KATZ or Raycom television
26 network (as distinct from cable network), and games selected to be televised by national,
27 free, over the air television networks, including ABC, NBC and CBS.

28 The Declarations of Mr. Zuckerman (who was party to the July 1, 1985 contract

1 between FSU and KMPH) and Mr. Johnson, the Assistant Athletic Director at FSU who
2 participated in the negotiations which culminated in that contract, both evidence the
3 clear intent of the parties to grant KMPH the exclusive right to televise FSU athletic
4 events as set forth above. The incontrovertible evidence is that KMPH also was granted
5 the rights to sell these rights to cable companies. A subsequent contract, the earliest of
6 which is dated January 31, 1989 between Defendants, the Big West and Marketing,
7 cannot modify, abrogate or terminate the preexisting contractual rights of KMPH.

8 For several years, SportsChannel, aware of the rights owned by KMPH, honored
9 the right of KMPH to telecast FSU games within its ADI. In fact, SportsChannel acceded
10 to the preexisting rights of KMPH until recently [Zuckerman Declaration, Paragraph 13,
11 Pages 3-4 and Exhibit "C"].

12 An injunction (or TRO) is available to enjoin the breach of a contract which can be
13 specifically enforced. See Cal. Civil Code Section 3423(5); Cal.Civ. Proc. Code Section
14 526, 2nd Subd.(5). Plaintiffs submit that specific enforcement is available for the
15 performance required in the contract between FSU and KMPH. Further, only by
16 broadcasting the UOP and San Jose State games can FSU and KMPH fulfill their mutual
17 obligations pursuant to the applicable contracts [Johnson Declaration Paragraph 16, Page
18 6].

19 FSU and UOP fear reprisals from their own conference and the other Defendants.
20 Unless this Court grants an injunction against the Big West, and its members, including
21 FSU, UOP and SJSU, FSU will have unwittingly been induced to breach its contract with
22 KMPH.

23 In that eventuality, a tort action for inducing breach of contract will lie in favor of
24 Plaintiffs. The elements of a cause of action for inducing breach of contract are (1) that
25 a valid contract exists between the plaintiff and another party; (2) that the defendant
26 had knowledge of the contract and intended to induce a breach thereof; (3) that the
27 contract was breached as a proximate result of the defendant's wrongful or unjustified
28 conduct; and, (4) damage to the plaintiff. Contemporary Investments, Inc., v. Safeco

1 Title Insurance Company, 145 Cal.App.3d 999, 1002, 19 Cal.Rptr. 822, 823 (Cal.App. 4
2 Dist. 1983) (quoting Mayes v. Sturdy Northern Sales, Inc., 91 Cal.App.3d 69, 78, 154
3 Cal.Rptr. 43 (1979)).

4 There can be no doubt that the Defendants had knowledge of the contract
5 [Johnson Declaration, Paragraph 10, Page 4]. In spite of this knowledge, the Big West,
6 Marketing and SportsChannel intentionally entered into agreements whereby KMPH is
7 prohibited from televising FSU athletic events for which it has purchased the rights. FSU
8 has admitted that it fears reprisals from Defendants the Big West, SportsChannel, and
9 possibly others [Pappas Declaration, Paragraph 13, Pages 8-9]. Thus, all of the elements
10 of the tort of inducing breach of contract are met.

11 Injunctive relief may be granted to restrain third persons from unlawfully inducing
12 breach of a contract when it will result in irreparable injury. See Sunbeam Corp. v.
13 Payless Drugstores, 113 F.Supp. 31, 47-48 (N.D. Cal. 1953). See also Montgomery
14 Enterprises v. Empire Theater, 204 Ala. 566, 86 So. 880 (1920). (Plaintiff who had
15 contracted for the "first run" of a film was granted an injunction against the defendant,
16 who, with knowledge of plaintiff's rights, had also contracted with the proprietor of the
17 film for the first run.)

18 Plaintiff, Pappas Telecasting, Incorporated, licensee of KMPH, is a trustee of the
19 public airwaves and the viewers it is licensed to serve. Communications Act of 1934,
20 Federal Communications Commission Reports, FCS 60-97091874, "Enbanc Programming
21 Inquiry," Page 2311:

22 "The broadcaster is obligated to make a positive, diligent and
23 continuing effort, in good faith, to determine the taste, needs
24 and desires of the public in his community and to provide
25 programming to meet those needs and interests. This again,
26 is a duty personal to the licensee and may not be avoided by
27 delegation of the responsibility to others." Id. at 2314.

28 Plaintiffs, sitting in its capacity as public trustee, is representing, as third-party